No. 15745

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOSE PIMENTAL NAVARRO,

Appellant,

vs.

ALBERT DEL GUERCIO, Acting District Director, Immigration and Naturalization Service at Los Angeles, California, and JOSEPH A. DUMMEL, Special Inquiry Officer, Immigration and Naturalization Service at Los Angeles, California,

Appellees.

APPELLEES' BRIEF.

LAUGHLIN E. WATERS,
United States Attorney,

RICHARD A. LAVINE,
Assistant U. S. Attorney,
Chief, Civil Division,

BRUCE A. BEVAN, JR.,
Assistant U. S. Attorney,
600 Federal Building,
Los Angeles 12, California,
Attorneys for Appellee.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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APPELLEES' BRIEF.

Statement of Jurisdiction.

On April 20, 1956, appellant filed his Complaint for Judicial Review and Declaratory Judgment.* The Answer of appellees was filed on June 28, 1956. On April 1 and April 8, 1957, the action was tried before the Honorable William M. Byrne, United States District Judge. Judg-

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*No reference can be made to the transcript of record since none has been prepared at the present time.

ment was entered in favor of appellees on May 10, 1957. A timely notice of appeal was filed on May 21, 1957.

The District Court had jurisdiction of the action under 5 United States Code Sec. 1009.

This Court has jurisdiction of the appeal under 28 United States Code Sec. 1291.

Statement of the Case.

In our opinion, there are only three questions involved: (1) Is there sufficient evidence to support the Immigration and Naturalization Service finding that appellant *for gain* assisted another alien to illegally enter the United States; (2) Was appellant eligible for the relief of suspension of deportation or voluntary departure; (3) Did the denial of relief under 8 U. S. C. Sec. 1182(c) constitute an abuse of discretion. These questions arose in the following manner.

The appellant is a native and citizen of Mexico who was admitted for permanent residence to this country on March 15, 1920. On March 4, 1954, appellant departed to Mexico and on the same day, returned to the United States. On the occasion of this trip, appellant assisted another Mexican alien to enter illegally. Appellant was indicted for this offense, and on April 30, 1954, pleaded guilty to violations of 8 U. S. C. Sec. 1324(a)(1) and of 8 U. S. C. Sec. 1324(a)(2).

On the same date, April 30, 1954, appellant was served with a warrant of arrest in deportation proceedings which

charged that he was subject to deportation pursuant to 8 U. S. C. Sec. 1251(a)(13) for having knowingly and for gain, assisted, aided and abetted an alien to enter the United States illegally. A deportation hearing was held upon this charge on June 3, 1954, and July 8, 1954.

On October 13, 1955, a Special Inquiry Officer ordered appellant deported under the charge. The Officer further found appellant ineligible for suspension of deportation and voluntary departure under 8 U. S. C. Secs. 1254(a),(e), and also denied relief under 8 U. S. C. Sec. 1182(c).

An administrative appeal of this decision was taken to the Board of Immigration Appeals. The Board upheld the decision of the Special Inquiry Officer by dismissing the appeal on March 12, 1956. In so doing, the Board exercised the discretion afforded under 8 U. S. C. Sec. 1182(c) and denied appellant relief under that section.

ARGUMENT.

I.

Appellant for Gain Assisted Another Alien to Enter the United States.

The first question is whether there is reasonable, substantial and probative evidence to support the finding of the Special Inquiry Officer on October 13, 1955, that it was for gain that appellant assisted the illegal entry of another alien on March 4, 1954. Appellant is deportable, if at all, under the provisions of 8 U. S. C. Sec. 1251(a)(13), which provides:

> "(a) Any alien in the United States . . . shall, upon the order of the Attorney General, be deported who—
>
> (13) prior to, or at the time of any entry, or at any time within five years after any entry, shall have, knowingly and for gain, encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of law."

It is undisputed that the record of conviction of appellant for having knowingly brought into the United States an alien not lawfully entitled to enter, satisfies all elements for deportation under Sec. 1251(a)(13) save the element of "gain."

> *Navarrette-Navarrette v. Landon,* 223 F. 2d 234, 236 (C. A. 9, 1955).

The evidence with respect to gain upon which the Special Inquiry Officer relied consists of appellant's admissions. Exhibit No. 2 to the instant deportation hearing was a signed statement of appellant taken on March 5, 1954. At page 2 thereof, appellant explained why he committed the offense:

> "Q. When, where and how did you last enter the United States? A. I entered 3/4/54 through the

port of San Ysidro in my car by presenting my passport.

Q. Why were you arrested by the Immigration Officers? A. The *(sic)* arrested me because I was taking that man up north.

Q. Who do you mean when you say 'that Man'? A. I don't know what his name is now, but I had his name written down on a little piece of paper when I went to Tijuana.

Q. Where did you first see the man that you refer to, who was riding in your car? A. I first saw him in his house, in Tijuana, on 3/4/54, about 4:00 P.M.

Q. Will you explain to me why you went to his house and why he was in your car? A. I am going to tell you the pure truth. I was working in Azuza *(sic)* selling vegetables in my truck, it is an army made into a store inside, and I was going up a hill and my truck was not running very well and when I stopped a man started talking to me. I know this man by sight only. He asked me if I would go to Tijuana and get the man who was with me in my car. He wrote his name and address on a piece of paper and gave it to me. He offered me $50 to go to Tijuana and bring him back to Azuza *(sic)*. When I started out again my truck broke down, broke a piston or something, I do not know. That left me with no way to work and I deceided *(sic)* to go to Tijuana and see my Compadre and see if he could lend me the money to have my truck fixed. If not I was going to see if, with good luck, I could bring back the boy. My compadre was sick when I reached Tijuana and could not lend me the money. So I deceided *(sic)* to take a chance and take the boy. I arrived in Tijuana 3/4/54 an *(sic)* went to see my compadre first then went to the boys house. I told him that I had been sent by a man to take him to Azuza *(sic)* and I showed him the paper that I had.

The mans name was on the paper but I do not remember what it is and I threw the paper away after I had found the boy. This man is not a boy, he is a man older than I am, boy is just an expression. After I met him and told him who I was we got in my car and I drove him to the park near the line and there he got out of the car and went and jumped the line and I went through the gate and when I reached the other side he was there on the sidewalk a little ways past the Grey Hound Bus depot in San Ysidro and there he got into my car and we drove directly to where we were arrested.

Q. When did you cross the border, that is what time, on 3/4/54? A. About 5:00 or 5:30 PM.

Q. Did you know that the man whom you brought to the park in your car did not have a legal right to enter and reside in the United States? A. Yes, I think that that was the reason I was being paid to take him to Azuza *(sic)*.

Q. Is the man that was arrested with you named Sixto Medina? A. Yes that is what he told me his name is, when he was presented to me a little while ago.

Q. Did the man who sent you after Sixto give you any money? A. He gave me $15 for gasoline."

In the hearing on July 8, 1954, appellant made the following statements:

"Q. Now this matter which resulted in your arrest and conviction for aiding an alien to enter the United States began in the early part of this year. Will you please tell us how this matter happened? A. A man in Azusa told me that he would give me $50 if I bring his father from Tijuana.

Q. Now at that time were you going on a trip to Tijuana? A. I was going to Tijuana to see my

compadre to borrow $50 because my truck had broken down and I could not move it."

Appellant's position is very clear. He needed $50 to fix his truck; he may have preferred obtaining the money from a friend in Tijuana, but when his friend was unable to make the loan, he decided to accept the offer of $50 for smuggling an alien into this country. The only conclusion deducible from these facts is that it was the offer of $50 that induced appellant to smuggle—had it not been for the money, appellant would not have "decided to take a chance and take the boy." Thus there clearly is sufficient evidence from which the Special Inquiry Officer reasonably could have found that appellant's smuggling attempt was "for gain." The facts herein do not appear to be any different than those contained in *Navarrette-Navarrette v. Landon,* 223 F. 2d 234, 236, *supra,* wherein this Court held:

". . . Appellant claims that he was helping the aliens because of a shortage of orange pickers in the Corona area. He denies receiving any money or anything of value from the aliens; he also denies any conversation regarding the payment of money. In short, he denies that his actions were in any way motivated by gain.

"The record, however, does not bear out these claims. Appellant, in a sworn statement dated November 28, 1949, admitted that he had an arrangement with Juan Ramirez to receive fifty dollars for bringing the latter's alien brother into the United States, that he went to Tijuana pursuant to that agreement, contacted the brother, and after the brother crossed the international line, appellant was transporting him into the interior of California when he was apprehended by immigration authorities. At the hearings, appellant was shown the statement and admitted he understood what it contained and that he

had made the statement. In addition, appellant testified at the hearings that the aliens told him they would give him fifty dollars when they got work in California.

"[1] These admissions by appellant, together with his conviction under 8 U. S. C. §144, provide reasonable, substantial and probative evidence to support the finding that appellant violated the deportation statute."

II.

Appellant Was Ineligible for the Relief of Voluntary Departure or Suspension of Deportation.

The next point concerns whether appellant was eligible for the relief available under 8 U. S. C. Sec. 1254(a) and 8 U. S. C. Sec. 1254(e). The Special Inquiry Officer determined that appellant was ineligible for suspension of deportation inasmuch as appellant could not establish the required continuous residence within the United States, having left for several hours on March 4, 1954. Appellant attacks this finding as erroneous. We assume for the purposes of this argument that the reason for the finding of ineligibility was erroneous. This is not conclusive of the issue, however, since

> "In the review of judicial proceedings the rule is well settled that, if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason."
>
> *Yanish v. Barber,* 232 F. 2d 939, 947 (C. A. 9, 1956).

The ultimate decision of the Special Inquiry Officer was that appellant was ineligible for the relief of suspension of deportation. In this he was correct. The finding of good moral character is a statutory prerequisite to the relief of

suspension of deportation under all the paragraphs of 8 U. S. C. Sec. 1254(a), as well as to the relief of voluntary departure under 8 U. S. C. Sec. 1254(e). 8 U. S. C. Sec. 1101(f)(3) precludes a finding of good moral character for a person who is or was

> "a member of one or more of the classes of persons, whether excludable or not, described in paragraphs (11), (12), and (31) of section 1182(a) of this title."

Appellant is a person described in Sec. 1182(a)(31), for that section pertains to

> "Any alien who at any time shall have, knowingly and for gain, encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of law."

Consequently, appellant is precluded by law from being able to establish his eligibility for the relief of suspension of deportation or of voluntary departure. Thus the action of the Special Inquiry Officer in so holding was proper, whatever his reasoning may have been.

III.

It Was Not an Abuse of Discretion to Deny Appellant Relief Under Section 1182(c).

8 U. S. C. Sec. 1182(c) provides:

> "Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of paragraphs (1)-(25), (30), and (31) of subsection (a) of this section. . . ."

Appellant, at the time of his deportation hearing, appiled for *nunc pro tunc* discretionary relief under this subsection. The Board of Immigration Appeals exercised its discretion and denied appellant such relief.

Since Sec. 1182(c) commits the granting of such relief to the "discretion of the Attorney General," judicial review thereof is precluded, as the Administrative Procedures Act (5 U. S. C. Sec. 1009) allows judicial review of agency action

> "Except so far as . . . (2) agency action is by law committed to agency discretion."

In view of the exercise of discretion in this case, this Court should not review the matter.

> *Anderson v. Holton,* 242 F. 2d 596 (C. A. 7, 1957);
>
> *United States ex rel. Kaloudis v. Shaughnessy,* 180 F. 2d 489 (C. A. 2, 1950).

Even if reviewed to determine whether there was an abuse of discretion, the action of the Immigration and Naturalization Service must be upheld. The Board recognized that hardship would result by a denial of Sec. 1182(c) relief, but nevertheless decided:

> "However, it is our opinion that the *nature of the acts* which gave rise to deportability which acts recently occurred, are such that the granting of the relief contained in Section 212(c) of the Immigration and Nationality Act is not warranted."

The act or acts giving rise to appellant's deportability, of course, concerned the smuggling of the alien. This is the most serious immigration offense with which one can

be charged. As was noted in *Dessalernos v. Savoretti,* 244 F. 2d 178, 183, 184 (C. A. 5, 1957), this is the *only* ground of deportation for which suspension is not possible.

> ". . . [A]liens who aid others to enter illegally, §1251(a)(13), are entirely precluded from seeking suspension of deportation, thus suggesting that Congress intended to penalize through the immigration laws those who violated them."

Such being the nature of the particular ground of appellant's deportation, there is no abuse of discretion in denying appellant his requested relief.

Conclusion.

In view of the foregoing, the judgment of the District Court should be affirmed.

Respectfully submitted,

LAUGHLIN E. WATERS,
United States Attorney,

RICHARD A. LAVINE,
Assistant U. S. Attorney,
Chief, Civil Division,

BRUCE A. BEVAN, JR.,
Assistant U. S. Attorney,
Attorneys for Appellee.